Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of The Effect of Foreign Mobile Termination Rates on U.S. Customers	IB Docket No. 04-398

<u>REPLY COMMENTS OF BELLSOUTH CORPORATION</u>

James G. Harralson
Charles P. Featherstun
1155 Peachtree St., N.E.
Suite 1800
Atlanta, GA 30309
(404) 249-3855

Its Attorneys

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EXECUTIVE SUMMARY

In its opening comments, BellSouth explained why the Commission should not attempt to regulate competitive mobile markets worldwide. The vast majority of commenters in this proceeding support this position. As the record makes clear, the circumstances regarding foreign mobile termination rates are thoroughly unlike those that led to benchmarks for fixed services and do not warrant FCC intervention.

First, the record contains no evidence of any discrimination by foreign mobile operators against U.S. carriers and consumers, which is a threshold condition for Commission intervention in foreign markets.

Second, mobile termination rates do not appear to be a significant problem for U.S. consumers. Mobile termination rates are falling in most of the world, and large amounts of U.S.-originated calls to foreign mobiles terminate in RPP countries, CPP countries with low termination rates, or CPP countries whose regulators are actively overseeing termination rates. Thus, it is not surprising that few consumers and no major U.S. consumer groups filed comments in response to the *Notice of Inquiry*.

Third, independent regulators in foreign countries have incentives to act upon any "excessive" mobile termination rates because the vast majority of calls terminated on foreign mobile networks originates within the country in which the network itself operates. Numerous foreign regulators are currently reviewing mobile termination rates, and some have already taken action to reduce rates.

Fourth, the appropriate market for analyzing mobile termination rates is the retail market for a bundle of mobile services, not mobile termination in isolation. This market is recognized to be competitive worldwide.

In sum, today's mobile markets differ dramatically from the foreign fixed markets described in the D.C. Circuit's decision affirming the Commission's 1997 *Benchmarks Order*. Benchmarks or other cost regulation are simply impractical in the mobile context. A single benchmark rate applicable to all countries would be arbitrary, and the Commission lacks the institutional capacity to either obtain sufficient market-specific data or to develop an appropriate analytical model.   Therefore, BellSouth believes that the most prudent course of action is for the FCC to continue to monitor foreign mobile termination rates and, if necessary, work on a bilateral basis with foreign regulators to address any egregious rates that discriminate against U.S. consumers and carriers.

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<u>REPLY COMMENTS OF BELLSOUTH CORPORATION</u>

BellSouth Corporation ("BellSouth") is pleased to submit these reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") inquiry regarding foreign mobile termination rates.[1] The overwhelming majority of commenters in this proceeding concur with BellSouth that the Commission should refrain from regulating foreign mobile termination rates at this time. Notably, the record demonstrates that conditions in the global mobile market are dramatically different from the fixed environment that led the Commission to impose benchmarks in 1997, and do not justify cost regulation by the FCC of foreign mobile markets. Furthermore, the comments highlight the difficulties the Commission would face in implementing any global cost regulation of foreign mobile termination rates, and demonstrate that such regulation is unnecessary in light of the downward trend in termination

[1] *See The Effect of Foreign Mobile Termination Rates on U.S. Customers*, 69 Fed. Reg. 65598 (Nov. 15, 2004) (Proposed rule and request for comments).

rates and the increasing involvement of foreign authorities in monitoring and regulating rates in their respective jurisdictions.

I. THE CIRCUMSTANCES HERE ARE THOROUGHLY UNLIKE THOSE THAT LED TO THE *BENCHMARKS ORDER* AND DO NOT WARRANT FCC INTERVENTION

The few commenters supporting FCC intervention in foreign mobile termination rates analogize the present situation to the FCC's action establishing benchmarks for fixed termination rates.[2] The Commission's benchmarks policy, however, was initiated in an environment characterized by "whipsawing" against U.S. carriers by foreign monopoly incumbents who faced few competitive or regulatory checks on their actions. These conditions are not present in today's global mobile market.

A. Foreign Mobile Carriers Do Not Discriminate Against U.S. Carriers and Consumers

The Commission established its benchmarks policy in order to counteract discrimination against U.S. carriers by foreign fixed carriers.[3] As discussed in BellSouth's opening comments, this threshold condition for intervention is not present in foreign mobile markets.[4] Commenters generally agree that there is no evidence to suggest that foreign mobile operators are charging discriminatory termination rates for calls that originate in the U.S.[5] Indeed, the record shows that, in certain foreign markets (*e.g.* in Latin America and the Caribbean), mobile termination

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2 *See, e.g.* AT&T Comments at 27-39; CompTel/ASCENT Comments at 8-10.

3 *International Settlement Rates,* Report and Order, 12 FCC Rcd 19806 (1997) ("Benchmarks Order").

4 BellSouth Comments at 7.

5 *See* BellSouth Comments at 4; *see also* Verizon Comments at 5-6; Western Wireless Comments at 2 and n.3; NTT DoCoMo Comments at 2 ("there do not appear to be any situations in which the rates charged by foreign mobile operators for terminating calls on their networks discriminate between domestic and international calls"); Orange SA Comments at 8 ("Orange has seen no evidence suggesting that mobile operators charge discriminatory termination rates to calls originating in the US"); GSM Europe at 8-9 (same); CTIA Comments at 9 (same).

rates for foreign-originated calls are lower than rates for domestic-originated calls.[6] National laws and regulations in most countries, including those implementing obligations under multilateral frameworks such as the EU and the WTO,[7] provide further guarantees against discriminatory rates, since most countries now expressly prohibit discrimination based on the origin of a call.[8]

B. High Mobile Termination Rates Are Not A Significant Problem for U.S. Consumers

A few commenters, in support of their argument for Commission regulation, have painted an alarming picture of supposedly "excessive" foreign mobile termination rates spiraling upward in tandem with continuing growth in mobile subscribership and traffic worldwide.[9] This argument, however, is unavailing when placed within the context of three key points.

First, mobile termination rates are generally falling in most of the world. According to one study, average mobile termination rates have declined significantly from 2000 to 2004 in all regions of the world except in Europe, where rates have stayed approximately the same.[10] Furthermore, very recent studies show that even in Europe, rates are beginning to decline. In

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[6] BellSouth Comments at 4; Cable & Wireless Comments at 9, 13 (in many cases, U.S. carriers have been able to negotiate termination rates that are below the rates paid by local fixed carriers).

[7] The European regulatory framework for electronic networks, which became effective in July 2003, requires national regulators to consider whether the market for voice call termination on individual mobile networks is adequately competitive. All Member States are required to adopt appropriate measures to implement the Framework. According to Vodafone, all regulators in Europe have imposed non-discrimination obligations. Similarly, most countries prohibit discrimination on the basis of origin as a part of their commitments under the WTO Basic Telecommunications Agreement. *See* Vodafone Comments at 9, 12.

[8] *See, e.g.* Vodafone Comments at 9-10 and Annex D; Telefonica Comments at 3-4; Telecom Italia Comments at 3.

[9] *See* AT&T Comments at 1-8; MCI Comments at 5-10.

[10] *See* Verizon Comments at 3; *see also* NTT DoCoMo Comments at 3-4 (NTT DoCoMo has voluntarily reduced its termination rates by 84 percent since 1996).

December 2004, the European Commission reported that mobile termination rates for all operators in a large number of EU nations decreased by approximately 13-14 percent in 2004.[11] Vodafone, which operates in a number of European CPP markets, indicates that regulatory pressure in the markets in which it operates has caused rate reductions in the double digits from 1999 to 2005, with average annual average reductions of as much as 14 percent annually.[12] Further downward pressure on rates can be expected as implementation of the EU regulatory framework progresses within individual countries.

Second, the Commission's own data shows that significant amounts of U.S.-originated calls to foreign mobiles terminate in RPP countries, CPP countries with low termination rates, or CPP countries whose NRAs are actively overseeing termination rates.[13] For example, Canada, an RPP country, is the largest destination market for U.S.-originated calls to foreign mobile subscribers. The volume of calls to Canadian mobiles is equivalent to more than 20% of the total global minutes of calls to all CPP countries listed in the *Notice.*[14] With respect to CPP countries, the GSM Association notes that calls to six countries with relatively low or regulated termination rates account for nearly 40 percent of total minutes to CPP countries identified by the FCC in Table 4 of the *Notice.*[15] Using more recent data from Telegeography, CTIA states that for nine of the top ten destinations for mobile terminated calls in 2001-2003, total mobile termination

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11 CTIA Comments at 5 (citing Commission of the European Communities, *European Electronic Communications Regulation and Markets 2004 (10th report),* Volume II at Annex 3, Market Overview, p.36).

12 Vodafone Comments at 11.

13 CTIA Comments at 4; GSM Association Comments at 12-13.

14 GSM Association Comments at 11-12.

15 *Id.*

payments fell 14 percent (and remained constant in the tenth country).[16] Given the large volume of U.S.-originated calls that terminate in Europe, these statistics can only improve as European regulators proceed with their implementation of the review processes mandated by the EU regulatory framework.[17]

Finally, BellSouth notes that fewer than a dozen individual consumers commented in the opening round, and no major U.S. consumer groups filed comments. Similarly, no U.S. consumers or consumer groups filed comments in the *ISP Reform* proceeding.[18] Verizon reports that it received fewer than 15 complaints regarding foreign mobile termination charges in 2004.[19] Therefore, the Commission should consider to what extent U.S. consumers truly consider foreign mobile termination surcharges to be a significant problem.

C. Foreign Regulators Provide a Sufficient Check on Mobile Termination Rates

When the Commission adopted its *Benchmarks Order*, it did not have the chance to rely either on the market or on regulators to address problematic settlement rates. In 1997, there were far fewer independent regulators in foreign countries.[20] Over the past ten years, however, the United States and the FCC have been actively engaged in both bilateral and multilateral fora in order to encourage and assist in the establishment of independent regulators abroad. As a result,

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16 CTIA Comments at 4.

17 *See* note 6 *supra.*

18 *See Notice of Inquiry,* ¶ 6 (no comments were filed by U.S. consumers or consumer groups in the ISP reform docket.).

19 *See* Verizon Comments at 5-6.

20 In 1994, there were only 14 independent regulators globally. *See* Teamwork, Technology and Transformation Focusing on Broadband, Consumers and Homeland Security, International Bureau 2005 Annual Report at 25 (Jan. 13, 2005), *at* http://www.fcc.gov/realaudio/presentations/2005/011305/ib.ppt (visited Feb. 11, 2005); Irene Wu, "Traits of an Independent Communications Regulator: a Search for Indicators," International Bureau Working Paper Series (June 2004) at 4-5 (since 1990, the number of NRAs has roughly doubled every 4-5 years), *at* http://hraunfoss.fcc.gov/edocs_public/attachment/DOC-248467A1.pdf (visited Feb. 11, 2005).

the number of independent regulators worldwide has grown dramatically, to over 130 today.[21] It would be counterproductive for the Commission to now engage in actions that could undermine those regulators it has previously championed.[22] Such actions could also impair the constructive working relationships that the FCC has established with these regulators.

Not only do more independent regulators now exist, but both they and other regulators have incentives to act on any excessive mobile termination rates. The vast majority of calls terminating on foreign mobile networks (an estimated 95 percent in Europe, and a greater percentage in Japan) are originated within the country in which the network itself operates.[23] Since the majority of calls terminated on mobile networks are generated by customers of the carriers operating within that country, those carriers have a strong incentive to ensure that the wholesale prices they pay for mobile termination are set at efficient levels. Thus, foreign carriers and consumers will place pressure on a regulator to act if rates are excessive.[24] Furthermore, the interests of consumers and carriers within a particular foreign market will be aligned with those of U.S. consumers and carriers given the absence of discrimination, since mobile termination rates will equally affect both domestic and foreign callers to mobile phones. Thus, foreign

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21 International Bureau 2005 Annual Report at 25.

22 Verizon Comments at 4-5, 7 ("Intervention by the Commission could undermine or weaken the authority of foreign regulators, particularly in less developed countries"); *see also* CANTO Comments at 3 (same); CTIA Comments at 11-12 (Commission should not second-guess the outcomes of NRAs' proceedings).

23 Vodafone Comments at 7. *See also* Western Wireless Comments at 2 (more than 97% of all traffic terminating on WWI's European mobile networks originates in Europe); CTIA Comments at 4.

24 *See* Verizon Comments at 4; Vodafone Comments at 9-11, CTIA Comments at 8-9; NTT DoCoMo Comments at 2-4, 6; GSM Association Comments at 6-7; CANTO Comments at 3.

carriers and consumers will adequately represent the interests of all consumers worldwide, including those here in the U.S.[25]

Moreover, numerous foreign regulators have in fact acted or are in the process of reviewing rates. The EU's new regulatory framework for electronic communications, which became effective in July 2003, requires Member States to consider whether the market for mobile termination is adequately competitive.[26] As of January 2005, all but three Member States had notified the EU Commission of implementation of the new EU Framework into national law.[27] Several EU Member States already have implemented rate reductions as a result of their regulatory reviews. For example, the United Kingdom, France, and the Netherlands have instituted price caps on mobile termination rates.[28] Numerous others have commenced an inquiry into mobile termination rates, including several countries not previously identified in the *Notice* as having taken action.[29]

Regulators in non-European countries have also taken action to regulate mobile termination rates. For example, in some Latin American countries such as Argentina or Chile, mobile termination tariffs are decided directly by the NRA.[30] Australia has chosen to apply price

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25 Orange SA Comments at 3 ("the interests of US consumers are adequately protected where the country in which the calls are terminated has an independent regulator, unless there is clear evidence of discrimination against US users"); Vodafone Comments at 9; Cable & Wireless Comments at 7-8.

26 GSM Europe Comments at 5-7 (discussing EU actions generally); Vodafone Comments at 12-13; Orange SA Comments at 4-6; GSM Association Comments at 7-9 (UK, Netherlands, Australia, France); CTIA Comments at 5-6; Telefonica Comments at 4-5.

27 *See* Vodafone Comments, Annex A.

28 GSM Association Comments at 7-9.

29 *See* Vodafone Comments at Annex A (describing actions taken in Hungary, Poland, Malta, Portugal, and Romania); NTT DoCoMo Comments at n. 7 (Denmark, Estonia, Lithuania, and Slovakia have addressed mobile termination rates in 2004).

30 Telefonica Comments at 4.

cap regulation similar to the UK and France,[31] and in South Korea the regulator has chosen to apply a cost model beginning in 2004.[32] Thus, even Cable & Wireless, which complains that operators in many foreign jurisdictions have demanded "exorbitant rates" for mobile termination, states that "it is too soon for the FCC to take any prescriptive actions and that any such actions are likely to be ineffectual at this time," in part because many foreign regulators have become aware of the problem and are taking action.[33]

D. <u>Worldwide Mobile Markets Are Competitive</u>

As discussed in BellSouth's opening comments and in the Charles River Associates study attached to those comments, the appropriate market for analyzing mobile termination rates is the retail market for a bundle of mobile services, not mobile termination in isolation.[34] The comments in this proceeding confirm that this market is competitive worldwide, unlike the fixed termination market analyzed by the Commission in 1997. The most recent ITU data shows that approximately 80 percent of countries have competitive or partially competitive mobile markets.[35] According to Orange SA, all of the 25 EU markets have two or more mobile operators, and all but three have at least three mobile operators,[36] and the European Commission recently found that the average market share of leading operators dropped more in 2004 than in

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31 GSM Association Comments at 8-9.

32 *Notice* at Appendix B-6.

33 Cable & Wireless Comments at 8.

34 *See* BellSouth Comments at 5.

35 *See id.* at 5-6; Verizon Comments at 3 (citing International Telecommunication Union Country and Regulators Profile at www.itu.int/ITU-D/treg/profiles/guide.asp (visited Jan. 7, 2005)).

36 Orange SA Comments at 4.

the 2001-2003 period combined.[37] Similarly, AHCIET states that mobile markets in Latin America are "very competitive."[38]

E. **The Circumstances Cited in the D.C. Circuit's *Cable & Wireless* Decision No Longer Apply**

In upholding the Commission's authority to impose benchmarks on foreign fixed termination rates, the D.C. Circuit in *Cable & Wireless p.l.c. v. FCC* took into account the prevailing conditions in the fixed market at that time. As described above, however, foreign mobile termination rates are subject to market conditions very different from those applicable to foreign fixed termination rates in 1997, when the Commission issued its *Benchmarks Order.* Given these differences, it is questionable whether the *Cable & Wireless* reasoning would continue to apply with respect to the regulation of foreign mobile termination rates.

First, the D.C. Circuit explained at the outset that the fact that "the [telecommunications] industry remains non-competitive in much of the rest of the world" had "important consequences for [the] case."[39] In contrast, the mobile market is fiercely competitive in the vast majority of foreign markets.

Second, the D.C. Circuit noted that the price of foreign termination services exceeded "not only actual costs, but also the price that foreign carriers charge their own subscribers for comparable local services."[40] As explained above, there is no evidence of similar discrimination against callers outside the carrier's home market in the mobile context. In the absence of

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37 Telefonica Comments at 5-6.

38 AHCIET Comments at 4; see also BellSouth Comments at 6 (describing competition in Latin American markets).

39 *Cable & Wireless p.l.c. v. FCC*, 166 F.3d 1224, 1227 (D.C. Cir. 1999).

40 *Id.*

discrimination or other indications of competitive misconduct, the Commission should not act to intervene

Third, the D.C. Circuit noted that the Commission's *Benchmarks Order* was, in essence, a remedy of last resort. Prior to adopting benchmarks, the FCC had engaged in extensive, but unsuccessful, efforts for over 15 years in order to drive settlement rates downward.[41] Here, in contrast, there is no reason for the Commission to act. Competition is driving down mobile termination rates, and foreign regulators are already engaged in and/or have been successful in achieving further reductions in mobile termination rates in their own countries. Commission action at this time would thus be wholly unwarranted.

Finally, as noted above, the majority of foreign mobile termination charges are being paid to countries with RPP regimes or with CPP regimes that have low rates or have regulators acting to reduce rates. The *Cable & Wireless* court noted, and apparently accepted, the Commission's estimate that 70 percent of the $5.4 billion in total U.S. settlement payments, or $3.78 billion, represented an above-cost subsidy from U.S. consumers to foreign carriers.[42] In contrast, the record in this proceeding provides no evidence of a problem of such magnitude.

II. RATHER THAN IMPOSING A UNILATERAL REMEDY, THE COMMISSION SHOULD ALLOW FOREIGN REGULATORS TO ACT

As described above, many foreign regulators are taking action to evaluate and/or regulate mobile termination rates in their own jurisdictions. Each regulator is best placed to evaluate any problems with mobile termination rates in its own country and to impose any necessary

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41 *Id.* at 1227-1228; *see also* AT&T Comments at 27 ("The Commission adopted its 1997 settlement rate benchmarks after many years of unsuccessful efforts to reduce unreasonably high settlement rates by other means"); CTIA Comments at 8 (the Commission's *Benchmarks Order* came after "years of effort in bilateral and multilateral fora to address discriminatory accounting rates").

42 *Cable & Wireless,* 166 F.3d at 1227.

remedies. Each regulator has the power and resources to gather the relevant cost data from its own carriers, the expertise in local market conditions, and the right to evaluate and incorporate appropriate policy objectives. In many countries, the regulator has already begun this painstaking multi-year review process.

Because foreign regulators can best address problems with their local mobile termination rates, the Commission should refrain from unilaterally imposing cost regulation upon foreign rates at this time. The record demonstrates that such regulation would be at best tremendously challenging, and at worst impossible. First, most commenters agree that a single benchmark rate, although relatively simple to implement, would be wholly arbitrary because it would fail to reflect actual market conditions.[43] Mobile termination costs are affected by numerous considerations. For example, Vodafone lists nineteen non-exclusive factors that should be taken into account – including coverage area, terrain, and population density, to name just a few.[44] These factors will vary widely from country to country. Furthermore, as discussed in BellSouth's opening comments, mobile termination rates in developing countries may also appropriately incorporate social policy objectives such as universal service.[45] A single benchmark rate could not capture these varying elements.

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[43] Orange SA Comments at 6 (a single global benchmark rate, although it could be established relatively easily, would be of little value because it would inevitably fail to reflect relevant market specific conditions); CTIA Comments at 11; GSM Association Comments at 14-15 ("benchmarks applicable to hundreds of competitive mobile carriers are blunt and overbroad because they apply the same regulatory treatment to a host of different carriers and marketplace conditions"); Western Wireless Comments at 9 ("Because the characteristics of each national mobile market will be different, any cost model that does not adequately take into account the salient variations in such markets would be arbitrary and capricious"); Orange SA Comments at 7 (the issues surrounding cost allocation methodologies are highly complex, involve matters of regulatory judgment, and are strongly influenced by market specific factors; therefore, they can only be considered on an individual market basis with proper regard to relevant market and operator specific data).

[44] Vodafone Comments at 23-25.

[45] BellSouth Comments at 14-18.

Second, the Commission lacks the institutional capacity to conduct market-specific analyses. Collecting adequate data for each of the 161 CPP markets would be difficult, if not downright impossible.[46] The input data for the Commission's prior benchmarks regimes were publicly and relatively easily accessible. For example, the Commission's 1997 fixed benchmarks relied on cost inputs from publicly available information for tariffed components for the fixed networks at issue. Similarly, the Commission's benchmarks on CLEC access rates were based on the comparable, publicly tariffed ILEC rates.[47] The FCC does not have comparable cost data for foreign mobile network components,[48] and lacking direct regulatory authority over the relevant foreign mobile carriers, the Commission has no practical way of collecting such data.[49] Foreign regulators, which do have access to cost data from carriers in their respective jurisdictions, could not release it to the Commission due to the confidential nature of this data.[50]

Even if the FCC could somehow obtain cost data, it is questionable whether the agency could develop an appropriate analytical model. The Commission has no significant experience with CPP as a business model for mobile carriers,[51] and it cannot use RPP rates as a proxy for CPP rates because of underlying differences in demand conditions and other factors inherent in

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46 GSM Association Comments at 14.

47 *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9948-49(¶ 61) (2001).

48 GSM Association Comments at 13-14.

49 Western Wireless Comments at 9.

50 Orange SA Comments at 3.

51 CTIA Comments at 13.

the different regimes.[52] Indeed, given the Commission's consistent reliance on competition to regulate the wireless industry in the United States, the agency has had little experience with or need for cost modeling for wireless termination in the U.S., let alone under the varying cost structures found in other countries.[53]

Neither can the Commission simply extrapolate its experience with (foreign or domestic) fixed networks into the wireless context. As Vodafone explains, the "application of LRIC methods to a mobile network entails additional challenges and complexities distinct from traditional LRIC modeling for fixed networks," and there is no consensus on how such a model should be built.[54] In particular, Vodafone highlights some of the flaws inherent in AT&T's proposed R-TCP study. These flaws include (1) applying the same fixed and common cost allocation that mobile operators use for domestic retail mobile-to-mobile calls to wholesale mobile termination;[55] (2) using many on-net tariff rates, which may be significantly below the cost of mobile termination;[56] (3) applying a model developed for an environment dominated by monopoly incumbents to the competitive mobile environment;[57] and (4) ignoring the magnitude of fixed costs in mobile networks, which means that retail prices cannot be considered a proxy for termination at all.[58]

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52 *See* CTIA Comments at 9-10; Vodafone Comments at 13-14; Western Wireless Comments at n. 28; GSM Association Comments at 10.

53 CTIA Comments at 13.

54 Vodafone Comments at 17-25.

55 *Id.* at 26.

56 *Id.* at 26-27.

57 *Id.* at 28.

58 *Id.* at 29.

These are just a few of the practical difficulties that the Commission would face in attempting to impose cost regulation upon mobile termination rates in the 161 CPP jurisdictions. BellSouth respectfully submits that, in light of the numerous actions taken by foreign regulators, such action is unnecessary and would be a wasteful use of Commission resources.

III. **CONCLUSION**

For the above reasons, BellSouth reiterates that the Commission should refrain from regulating foreign mobile termination rates. Instead, the Commission should continue to monitor foreign mobile termination rates and, if necessary, work on a bilateral basis with its sister agencies abroad to address any egregious instances of discrimination against U.S. consumers and carriers.

Respectfully submitted,

BELLSOUTH CORPORATION

By: __*/s/ Charles P. Featherstun*__

James G. Harralson
Charles P. Featherstun
1155 Peachtree St., N.E.
Suite 1800
Atlanta, GA 30309
(404) 249-3855

Its Attorneys

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